

1 F.T. Alexandra Mahaney, State Bar No. 125984  
WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation  
2 12235 El Camino Real, Suite 200  
San Diego, CA 92130  
3 Telephone: (858) 350-2300  
Facsimile: (858) 350-2399  
4 Email: amahaney@wsgr.com

5 Bruce R. Genderson (admitted *pro hac vice*)  
6 Aaron P. Maurer (admitted *pro hac vice*)  
Rachel Shanahan Rodman (admitted *pro hac vice*)  
7 Adam D. Harber (admitted *pro hac vice*)  
WILLIAMS & CONNOLLY LLP  
8 725 Twelfth St. NW  
Washington, DC 20005  
9 Telephone: (202) 434-5000  
10 Facsimile: (202) 434-5029

11 Attorneys for Defendant and Counterclaimant  
SENORX, INC.

12  
13 IN THE UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN JOSE DIVISION

16 HOLOGIC, INC., CYTYC CORPORATION and )  
HOLOGIC L.P., )

17 Plaintiffs, )

18 v. )

19 SENORX, INC., )

20 Defendant. )

21 SENORX, INC., )

22 Counterclaimant, )

23 v. )

24 HOLOGIC, INC., CYTYC CORPORATION and )  
HOLOGIC L.P., )

25 Counterdefendants. )

26 UNOPPOSED ADMINISTRATIVE MOTION FOR  
27 PERMISSION TO FILE REPLY BRIEF ISO SENORX'S  
28 OBJECTIONS TO AND MOTION TO STRIKE

Case No. 08-CV-0133 RMW

**UNOPPOSED ADMINISTRATIVE  
MOTION REQUESTING PERMISSION  
TO FILE REPLY BRIEF IN SUPPORT  
OF SENORX INC.'S OBJECTIONS TO  
AND MOTION TO STRIKE CERTAIN  
PORTIONS OF THE DECLARATION  
OF GLENN MAGNUSON IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

Date: April 21, 2008

Time: 2:00 p.m.

Courtroom: 6, 4th Floor

Judge: Hon. Ronald M. Whyte

CASE NO. 08-CV-0133 RMW

1 PLEASE TAKE NOTICE that pursuant to Civil Local Rule 79-5(b) and (c), Defendant  
2 SenoRx, Inc. ("SenoRx") hereby moves the Court for an order granting SenoRx permission to  
3 file a four page reply brief in support of SenoRx Inc.'s Objections to and Motion to Strike  
4 Certain Portions of the Declaration of Glenn Magnuson in Support of Plaintiffs' Motion for  
5 Preliminary Injunction ("SenoRx's Objections"). Plaintiffs do not oppose this request. Mahaney  
6 Decl. at ¶ 2. A copy of SenoRx's Reply Brief in support of SenoRx Inc.'s Objections to and  
7 Motion to Strike Certain Portions of the Declaration of Glenn Magnuson in Support of Plaintiffs'  
8 Motion for Preliminary Injunction is attached hereto as "Attachment A."

9 SenoRx makes this request because Plaintiffs' Opposition to SenoRx's Objections sets  
10 forth various arguments SenoRx would like the opportunity to brief. For example, SenoRx's  
11 reply addresses Plaintiffs' arguments regarding the applicability of the standard expressed in  
12 Rule 56(e) in the preliminary injunction context. SenoRx's reply also addresses  
13 mischaracterizations Plaintiffs made in their Opposition regarding SenoRx's request to strike  
14 portions of Mr. Magnuson's declaration.

15 For the foregoing reasons, and because this request is unopposed, SenoRx respectfully  
16 requests that the Court enter an order allowing SenoRx to file the attached reply brief in support  
17 of SenoRx Inc.'s Objections to and Motion to Strike Certain Portions of the Declaration of Glenn  
18 Magnuson in Support of Plaintiffs' Motion for Preliminary Injunction.

19 Dated: April 11, 2008

20 Respectfully submitted,

21  
22 By: /s/ F.T.Alexandra Mahaney  
23 F.T. Alexandra Mahaney, State Bar No. 125984  
24 WILSON SONSINI GOODRICH & ROSATI  
25 Professional Corporation  
26 12235 El Camino Real, Suite 200  
27 San Diego, CA 92130  
Telephone: (858) 350-2300  
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WILLIAMS & CONNOLLY LLP  
725 Twelfth St. NW  
Washington, DC 20005  
Telephone: (202) 434-5000  
Facsimile: (202) 434-5029

Attorneys for Defendant and Counterclaimant  
SENORX, INC.

# **EXHIBIT A**

F.T. Alexandra Mahaney, State Bar No. 125984  
WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation  
12235 El Camino Real, Suite 200  
San Diego, CA 92130  
Telephone: (858) 350-2300  
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SENORX, INC.

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

HOLOGIC, INC., CYTYC CORPORATION and )  
HOLOGIC L.P., )

Plaintiffs, )

v. )

SENORX, INC., )

Defendant. )

Case No. 08-CV-0133 RMW

**SENORX, INC.'S REPLY BRIEF IN  
SUPPORT OF ITS OBJECTIONS TO  
AND MOTION TO STRIKE CERTAIN  
PORTIONS OF THE DECLARATION  
OF GLENN MAGNUSON IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
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SENORX, INC., )

Counterclaimant, )

v. )

HOLOGIC, INC., CYTYC CORPORATION and )  
HOLOGIC L.P., )

Counterdefendants. )

Date: April 21, 2008

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SENORX, INC.'S REPLY BRIEF ISO ITS OBJECTIONS  
TO AND MOTION TO STRIKE CERTAIN PORTIONS OF  
THE DECLARATION OF GLENN MAGNUSON

CASE NO. 08-CV-0133 RMW

## ARGUMENT

Plaintiffs' arguments on the equitable factors in its Motion for Preliminary Injunction are premised on hearsay and the self-serving speculation of a Hologic marketing executive. These statements are improper evidence in the context of a preliminary injunction hearing. SenoRx urges that this Court strike those statements.

### **I. The Standard Expressed in Rule 56(e) is Not "Inapplicable" in the Preliminary Injunction Context.**

Contrary to Plaintiffs' mischaracterization, SenoRx's Motion to Strike does not suggest that Fed. R. Civ. P. 56(e) directly governs the submission of evidence by declaration in the context of a preliminary injunction. SenoRx never stated that it does. But it is equally untrue that "the requirements of Rule 56(e) are inapplicable in the preliminary injunction context." Pl. Opp. at 2 (emphasis added). Civil Local Rule 7-5(b), which Plaintiffs do not cite in their Opposition, governs declarations submitted to this Court. It states that "[a]n affidavit or declaration may contain only facts, must conform as much as possible to the requirements of FRCivP 56(e), and must avoid conclusions and argument." Civil L.R. 7-5(b) (emphasis added).<sup>1</sup> That is, although Rule 56(e) does not directly apply, the standard embodied in that rule – that an "affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated" – should guide this Court's view of what is acceptable content for a supporting declaration "as much as possible." *See id.*

While a court "may give inadmissible evidence some weight in consideration of a motion for preliminary injunction," *Arthur J. Gallagher & Co., Inc. v. Edgewood Partners Ins. Center*, No. C07-06418, 2008 WL 205274, \*2 n.3 (N.D. Cal. Jan. 23, 2008) (emphasis added), it is not required to do so. *See, e.g., SunL Group, Inc. v. Seaseng, Inc.*, No. EDCV-07-807, 2007 WL

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<sup>1</sup> This standard, which was quoted in the first sentence of SenoRx's original argument, makes it clear that SenoRx never stated that Rule 56(e) itself applied here. Rather, the standard expressed in that Rule, as applied through Civil Local Rule 7-5(b), should guide "as much as possible" this Court's determination of what is and is not permissible in a declaration.

1 4144992, \*3 (C.D. Cal. Sept. 14, 2007) (striking statements from a declaration for lack of  
2 foundation when considering a motion for preliminary injunction even though the court “may, at  
3 its discretion, consider inadmissible evidence, including hearsay statements, on a motion for  
4 preliminary injunction”); *Ticketmaster L.L.C. v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096,  
5 1103 n.2 (C.D. Cal. 2007) (considering evidentiary objections, including lack personal  
6 knowledge and hearsay, to a declaration in the preliminary injunction context, even though the  
7 court “is not strictly bound by all rules of evidence” in that context). Nor does the fact of a  
8 request for a preliminary injunction render this Court’s Local Rules completely inapplicable.

9       Indeed, the rationale Plaintiffs offer for their reliance on inadmissible evidence and  
10 speculation is that the urgency involved with a preliminary injunction motion makes it difficult  
11 to obtain affidavits from experts who would be qualified to testify at trial. Pl. Opp. at 2. That  
12 may be true in some instances, but not here. Not only did Plaintiffs know of SenoRx’s launch of  
13 the Contura device months before filing this lawsuit, Plaintiffs waited an additional month before  
14 requesting a preliminary injunction. Instead of submitting cogent, supportable, admissible  
15 evidence, Plaintiffs – despite bearing the burden on all factors supporting their request for an  
16 injunction – chose to rely on one clearly inadmissible and conclusory declaration. While this  
17 Court has discretion to consider speculation and clearly inadmissible evidence, there is no reason  
18 to do so here.

19 **II. This Court Should Disregard or Heavily Discredit the Speculative, Unsupported,**  
20 **and Inadmissible Statements in Mr. Magnuson’s Declaration.**

21       Contrary to Plaintiffs’ argument, SenoRx does not question Mr. Magnuson’s ability to  
22 opine about the market for his product. Where SenoRx believes this Court should draw the line,  
23 however, is where those opinions cross into speculation about medical opinion and the medical  
24 community’s view of what is considered safe and sufficiently tested.

25       These are not tangential points. Mr. Magnuson’s speculation on these topics (in  
26 paragraphs 18 and 23) is the only support for the primary argument made in Plaintiffs’ public  
27 interest and irreparable harm sections. That is, Plaintiffs have argued that a preliminary

injunction is necessary because SenoRx's "untested" and "unsafe" product will cause the medical community to turn away from balloon brachytherapy. *See* Pl. Br. at 23-24. But Mr. Magnuson is not a medical doctor, and he holds no scientific degrees. Ex. 1 (Magnuson Tr.), at 7:22-8:4, 12:2-8.<sup>2</sup> Notwithstanding the knowledge he may have gained about the breast brachytherapy market in his less than two years of experience, SenoRx respectfully requests that this Court disregard the statements in his declaration that contain unsupported speculation on areas outside of his personal knowledge.<sup>3</sup>

### CONCLUSION

For the reasons stated above and in its original objections, SenoRx respectfully asks that this Court not exercise its discretion to consider the speculative, unsupported, and inadmissible statements identified in Mr. Magnuson's Declaration in Support of Plaintiffs' Motion for Preliminary Injunction.

Dated: April 11, 2008

Respectfully submitted,

By: /s/ F.T. Alexandra Mahaney  
 F.T. Alexandra Mahaney, State Bar No. 125984  
 WILSON SONSINI GOODRICH & ROSATI  
 Professional Corporation  
 12235 El Camino Real, Suite 200  
 San Diego, CA 92130  
 Telephone: (858) 350-2300  
 Facsimile: (858) 350-2399  
 Email: amahaney@wsgr.com

---

<sup>2</sup> The relevant excerpts of Mr. Magnuson's deposition are attached as Exhibit 1 to the Declaration of Aaron P. Maurer in Support of Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction.

<sup>3</sup> Although not addressed here for the sake of brevity, SenoRx stands by the other objections made in its original Motion to Strike.



Bruce R. Genderson (admitted *pro hac vice*)  
Aaron P. Maurer (admitted *pro hac vice*)  
Rachel Shanahan Rodman (admitted *pro hac vice*)  
Adam D. Harber (admitted *pro hac vice*)  
WILLIAMS & CONNOLLY LLP  
725 Twelfth St. NW  
Washington, DC 20005  
Telephone: (202) 434-5000  
Facsimile: (202) 434-5029

Attorneys for Defendant and Counterclaimant  
SENORX, INC.

CERTIFICATE OF SERVICE

U.S. District Court, Northern District of California,  
*Hologic, Inc. et al. v. SenoRx, Inc.*  
Case No. C-08-0133 RMW (RS)

I, Kirsten Blue, declare:

I am and was at the time of the service mentioned in this declaration, employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 12235 El Camino Real, Ste. 200, San Diego, CA, 92130.

On April 11, 2008, I served a copy(ies) of the following document(s):

**UNOPPOSED ADMINISTRATIVE MOTION REQUESTING PERMISSION TO  
FILE REPLY BRIEF IN SUPPORT OF SENORX INC.'S OBJECTIONS TO AND  
MOTION TO STRIKE CERTAIN PORTIONS OF THE DECLARATION OF  
GLENN MAGNUSON IN SUPPORT OF PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

on the parties to this action by placing them in a sealed envelope(s) addressed as follows:

Henry C. Su (suh@howrey.com)  
Katharine L. Altemus (altemusk@howrey.com)  
HOWREY LLP  
1950 University Avenue, 4th Floor  
East Palo Alto, CA 94303  
Telephone: (650) 798-3500  
Facsimile: (650) 798-3600

Attorneys for Plaintiffs  
HOLOGIC, INC. CYTYC  
CORPORATION and  
HOLOGIC LP

Matthew Wolf (wolfm@howrey.com)  
Marc Cohn (cohnm@howrey.com)  
HOWREY LLP  
1229 Pennsylvania Avenue, NW  
Washington, DC 20004  
Telephone: (202) 783-0800  
Facsimile: (202) 383-6610

Attorneys for Plaintiffs  
HOLOGIC, INC. CYTYC  
CORPORATION and  
HOLOGIC LP

☒ (BY MAIL) I placed the sealed envelope(s) for collection and mailing by following the ordinary business practices of Wilson Sonsini Goodrich & Rosati, 12235 El Camino Real, Ste. 200, San Diego, CA. I am readily familiar with WSGR's practice for collecting and processing of correspondence for mailing with the United States Postal Service, said practice being that, in the ordinary course of business, correspondence with postage fully prepaid is deposited with the United States Postal Service the same day as it is placed for collection.

☒ (BY ELECTRONIC MAIL) I caused such document(s) to be sent via electronic mail (email) to the above listed names and email addresses.

☐ (BY PERSONAL SERVICE) I caused to be delivered by hand to the addressee(s) noted above. I delivered to an authorized courier or driver to be delivered on the same date. A proof of service signed by the authorized courier will be filed with the court upon request.

☐ (BY OVERNIGHT DELIVERY) I placed the sealed envelope(s) or package(s), to the addressee(s) noted above, designated by the express service carrier for collection and overnight delivery by following the ordinary business practices of Wilson Sonsini

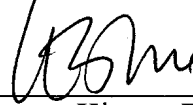
1 Goodrich & Rosati, 12235 El Camino Real, Ste. 200, San Diego, CA. I am readily  
2 familiar with WSGR's practice for collecting and processing of correspondence for  
3 overnight delivery, said practice being that, in the ordinary course of business,  
4 correspondence for overnight delivery is deposited with delivery fees paid or provided for  
5 at the carrier's express service offices for next-day delivery the same day as the  
6 correspondence is placed for collection.

7 ☐ (BY FACSIMILE) I caused to be transmitted by facsimile machine (number of sending  
8 facsimile machine is (858) 350-2399 at the time stated on the attached transmission  
9 report(s) by sending the documents(s) to (see above). The facsimile transmission(s)  
10 was/were reported as complete and without error.

11 ☒ (BY CM/ECF) I caused such document(s) to be sent via electronic mail through the Case  
12 Management/Electronic Case File system with the U.S. District Court for the Northern  
13 District of California.

14 I declare under penalty of perjury under the laws of the United States that the above is true  
15 and correct, and that this declaration was executed on April 11, 2008.

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Kirsten Blue

F.T. Alexandra Mahaney, State Bar No. 125984  
Natalie J. Morgan, State Bar No. 211143  
WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation  
12235 El Camino Real, Suite 200  
San Diego, CA 92130  
Telephone: (858) 350-2300  
Facsimile: (858) 350-2399  
Email: [amahaney@wsgr.com](mailto:amahaney@wsgr.com)  
Email: [nmorgan@wsgr.com](mailto:nmorgan@wsgr.com)

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WILLIAMS & CONNOLLY LLP  
725 Twelfth St. NW  
Washington, DC 20005  
(202) 434-5000

Attorneys for Defendant and Counterclaimant  
SENORX, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

HOLOGIC, INC., CYTIC CORPORATION  
and HOLOGIC L.P.,

Plaintiffs,

v.

SENORX, INC.,

Defendant.

CASE NO.: C08-0133 RMW (RS)

**DECLARATION OF F.T. ALEXANDRA  
MAHANEY IN SUPPORT OF  
UNOPPOSED ADMINISTRATIVE  
MOTION REQUESTING PERMISSION  
TO FILE REPLY BRIEF IN SUPPORT  
OF SENORX INC.'S OBJECTIONS TO  
AND MOTION TO STRIKE CERTAIN  
PORTIONS OF THE DECLARATION  
OF GLENN MAGNUSON IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

Date: April 21, 2008  
Time: 2:00 p.m.  
Ct. Rm: Courtroom 6, 4<sup>th</sup> Floor  
Judge: Hon. Ronald M. Whyte

AND RELATED COUNTERCLAIMS

1 I, F.T. Alexandra Mahaney, declare are follows:

2 1. I am a partner at the law firm Wilson Sonsini Goodrich & Rosati and a member of  
3 the Bar of this court, and I serve as one of the outside counsel for Defendant SenoRx, Inc.  
4 ("SenoRx"). The following declaration is based on my personal knowledge, as if called upon to  
5 testify, I could and would competently testify as to the matters set forth herein.

6 2. Counsel for Plaintiffs has informed us that they are not opposing this motion.

7 I declare under penalty of perjury that the foregoing is true and correct. Executed this  
8 11th day of April, 2008, at San Diego, California.

9  
10 s/F.T. Alexandra Mahaney  
11 F.T. Alexandra Mahaney  
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CERTIFICATE OF SERVICE

U.S. District Court, Northern District of California,  
*Hologic, Inc. et al. v. SenoRx, Inc.*  
Case No. C-08-0133 RMW (RS)

I, Kirsten Blue, declare:

I am and was at the time of the service mentioned in this declaration, employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 12235 El Camino Real, Ste. 200, San Diego, CA, 92130.

On April 11, 2008, I served a copy(ies) of the following document(s):

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Telephone: (650) 798-3500  
Facsimile: (650) 798-3600

Attorneys for Plaintiffs  
HOLOGIC, INC. CYTYC  
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HOLOGIC LP

Matthew Wolf (wolfm@howrey.com)  
Marc Cohn (cohnm@howrey.com)  
HOWREY LLP  
1229 Pennsylvania Avenue, NW  
Washington, DC 20004  
Telephone: (202) 783-0800  
Facsimile: (202) 383-6610

Attorneys for Plaintiffs  
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CORPORATION and  
HOLOGIC LP

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District of California.

9 I declare under penalty of perjury under the laws of the United States that the above is true  
10 and correct, and that this declaration was executed on April 11, 2008.

11 

12 

---

Kirsten Blue

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

HOLOGIC, INC., CYTYC CORPORATION and  
HOLOGIC L.P.,

Plaintiffs,

v.

SENORX, INC.,

Defendant.

---

SENORX, INC.,

Counterclaimant,

v.

HOLOGIC, INC., CYTYC CORPORATION and  
HOLOGIC L.P.,

---

Counterdefendants.

CASE NO.: C08-0133 RMW (RS)

**[PROPOSED] ORDER GRANTING  
SENORX'S UNOPPOSED  
ADMINISTRATIVE MOTION  
REQUESTING PERMISSION TO FILE  
REPLY BRIEF IN SUPPORT OF  
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MOTION TO STRIKE CERTAIN  
PORTIONS OF THE DECLARATION  
OF GLENN MAGNUSON IN SUPPORT  
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PRELIMINARY INJUNCTION**



1 The Court, having considered Defendant SenoRx, Inc.'s ("SenoRx") Unopposed  
2 Administrative Motion Requesting Permission to File a Reply Brief in Support of Senorx Inc.'s  
3 Objections to and Motion to Strike Certain Portions of the Declaration of Glenn Magnuson in  
4 Support of Plaintiffs' Motion for Preliminary Injunction, finds that good cause exists pursuant to  
5 Civil Local Rule 79-5 for the Motion and hereby orders that the Motion is GRANTED in its  
6 entirety.

7 SenoRx's Reply Brief in support of SenoRx Inc.'s Objections to and Motion to Strike  
8 Certain Portions of the Declaration of Glenn Magnuson in Support of Plaintiffs' Motion for  
9 Preliminary Injunction ("SenoRx's Reply"), which was attached as "Attachment A" to SenoRx's  
10 Motion is deemed filed. The clerk shall enter SenoRx's Reply on the docket.

11 It is SO ORDERED

12  
13 Dated: \_\_\_\_\_, 2008

By: \_\_\_\_\_  
Honorable Ronald M. Whyte  
United States District Court Judge

CERTIFICATE OF SERVICE  
U.S. District Court, Northern District of California,  
*Hologic, Inc. et al. v. SenoRx, Inc.*  
Case No. C-08-0133 RMW (RS)

I, Kirsten Blue, declare:

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BRIEF IN SUPPORT OF SENORX INC.'S OBJECTIONS TO AND MOTION TO  
STRIKE CERTAIN PORTIONS OF THE DECLARATION OF GLENN  
MAGNUSON IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY  
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Facsimile: (650) 798-3600

Attorneys for Plaintiffs  
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HOWREY LLP  
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☒ (BY MAIL) I placed the sealed envelope(s) for collection and mailing by following the ordinary business practices of Wilson Sonsini Goodrich & Rosati, 12235 El Camino Real, Ste. 200, San Diego, CA. I am readily familiar with WSGR's practice for collecting and processing of correspondence for mailing with the United States Postal Service, said practice being that, in the ordinary course of business, correspondence with postage fully prepaid is deposited with the United States Postal Service the same day as it is placed for collection.

☒ (BY ELECTRONIC MAIL) I caused such document(s) to be sent via electronic mail (email) to the above listed names and email addresses.

☐ (BY PERSONAL SERVICE) I caused to be delivered by hand to the addressee(s) noted above. I delivered to an authorized courier or driver to be delivered on the same date. A proof of service signed by the authorized courier will be filed with the court upon request.

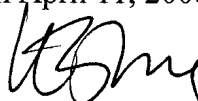
☐ (BY OVERNIGHT DELIVERY) I placed the sealed envelope(s) or package(s), to the addressee(s) noted above, designated by the express service carrier for collection and

1 overnight delivery by following the ordinary business practices of Wilson Sonsini  
2 Goodrich & Rosati, 12235 El Camino Real, Ste. 200, San Diego, CA. I am readily  
3 familiar with WSGR's practice for collecting and processing of correspondence for  
4 overnight delivery, said practice being that, in the ordinary course of business,  
correspondence for overnight delivery is deposited with delivery fees paid or provided for  
at the carrier's express service offices for next-day delivery the same day as the  
correspondence is placed for collection.

5 ☐ (BY FACSIMILE) I caused to be transmitted by facsimile machine (number of sending  
6 facsimile machine is (858) 350-2399 at the time stated on the attached transmission  
report(s) by sending the documents(s) to (see above). The facsimile transmission(s)  
was/were reported as complete and without error.

7 ☒ (BY CM/ECF) I caused such document(s) to be sent via electronic mail through the Case  
8 Management/Electronic Case File system with the U.S. District Court for the Northern  
District of California.

9 I declare under penalty of perjury under the laws of the United States that the above is true  
10 and correct, and that this declaration was executed on April 11, 2008.

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Kirsten Blue